Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-437

PEPSI COLA BOTTLING CO. OF PENNSAUKEN,
Petitioner,

v.

INEZ V. LOWENSTEIN, Individually, and A. MOORE LIFTER, JEROME L. MARKOVITZ, SUSAN L. CHACE, JANE B. LOWENSTEIN and INEZ V. LOWENSTEIN, Co-Executors of the Estate of EMMANUEL D. LOWENSTEIN, Successors in Interest to BBCI, INC., Successor in Interest to BOOTH BOTTLING CO., INC.,
Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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OPINION BELOW.

The opinion of the Court of Appeals is officially reported at 536 F. 2d 9 (3d Cir. 1976).

QUESTION PRESENTED.

Does a request for binding instructions provide the proper procedural predicate for judgment n.o.v. under Fed. R. Civ. P. 50(b), where defendant failed to renew its motion for directed verdict at the conclusion of all the evidence and where neither the Court nor the parties treated the request for binding instructions as the equivalent of a motion for directed verdict?

STATEMENT OF THE CASE.

Following a jury verdict in favor of the respondents in the amount of $1,414,750., petitioner filed various post-trial motions. The trial court granted petitioner's motion for judgment n.o.v. No rulings on petitioner's motion for a new trial, or its motion to alter and amend judgment, were sought or obtained at that time. Respondents appealed. The judgment n.o.v. was reversed by the Third Circuit on the grounds discussed below, and the matter was remanded for consideration of the unresolved motions in light of the Third Circuit opinion.

The Third Circuit, calling attention to its earlier decision in *Beebe v. Highland Tank and Manufacturing Company*, 373 F. 2d 886 (3d Cir.), *cert. denied* sub nom., *National Molasses Co. v. Beebe, Administrator*, 388 U. S. 911 (1967), held that a proper procedural predicate had not existed for judgment n.o.v. in view of the petitioner's admitted failure to move for a directed verdict at the close of all the evidence (536 F. 2d at 10). The Third Circuit recognized that where the trial court and the parties treat a request for binding instructions as a renewal of the motion for directed verdict, the request will constitute the requisite procedural predicate. There was nothing in the record of this action, however, to indicate that the trial judge or the parties considered the requests as a renewal of the motion for directed verdict (536 F. 2d at 11 n. 5). The judgment n.o.v. was accordingly reversed.

REASONS WHY CERTIORARI SHOULD BE DENIED.

As the sole basis for issuance of the writ, petitioner contends that the holding of the Third Circuit in this case conflicts with decisions in the Fifth and Seventh Circuits. An analysis of the cases indicates that no such conflict exists.

Rule 50(b) requires that a motion for directed verdict be made after presentation of all the evidence as a prerequisite to a later motion for judgment n.o.v. The rule has been cited as a prophylactic against violations of the Seventh Amendment. *Mutual Ben. Health & Accident Ass'n. v. Thomas*, 123 F. 2d 353, 355 (8th Cir. 1941). Moreover the requirement of a motion for directed verdict, as a condition precedent to a motion for judgment n.o.v., is a guarantee that the party against whom the motion is directed will have an opportunity at trial to cure any defects in proof; thus, the motion for judgment n.o.v. cannot be used as a trap at the conclusion of the trial. 5A MOORE'S FEDERAL PRACTICE, Section 50.08, at 2358-59 (1975).

The Federal courts have uniformly enforced this requirement, in holding that a motion for judgment n.o.v. may not be considered in the absence of a motion for directed verdict at trial. See, *e.g.*, *Continental Air Lines, Inc. v. Wagner-Morehouse, Inc.*, 401 F. 2d 23, 27 (7th Cir. 1968) (the Court of Appeals reversed judgment n.o.v. for plaintiff on the principal cause of action, though plaintiff had moved for directed verdict on defendant's counterclaim); *Guerrero v. American-Hawaiian Steamship Co.*, 222 F. 2d 238, 244 (9th Cir. 1955); *Southeastern Greyhound Lines v. McCafferty*, 169 F. 2d 1, 3 (6th Cir.), *cert. denied*, 335 U. S. 861 (1948). Several recent decisions have enforced the requirement, and denied judgment n.o.v., even where the undisputed evidence at trial clearly

supported judgment n.o.v. See *Rawls v. Daughters of Charity of Saint Vincent DePaul, Inc.*, 491 F. 2d 141, 147 (5th Cir.), *cert. denied*, 419 U. S. 1032 (1974); *Oliveras v. American Export Isbrandtsen Lines, Inc.*, 431 F. 2d 814, 816-17 (2d Cir. 1970). The Circuits agree that Rule 50(b) is not satisfied by defendant's motion for directed verdict at the close of plaintiff's case, but that such motion must be renewed at the close of all the evidence. See, *e.g.*, *Gillentine v. McKeand*, 426 F. 2d 717, 722-23 (1st Cir. 1970); *Beebe v. Highland Tank and Manufacturing Co., supra*, 373 F. 2d at 888 (3d Cir. 1967); *Godwin v. Brown*, 249 F. 2d 356, 362-63 (8th Cir. 1957). It is to be noted from the above cases that the Fifth and Seventh Circuits, cited by petitioner as in conflict with the Third, have been in the forefront of strict enforcement of Rule 50(b).

Petitioner has argued that *certiorari* is appropriate since the Fifth and Seventh Circuits recognize an exception to the above rule which the Third Circuit should have applied in this case; petitioner has failed to mention that this exception was *pioneered* by the Third Circuit.

In *Psinakis v. Psinakis*, 221 F. 2d 418 (3d Cir. 1955), the Court of Appeals held that the procedural predicate for a motion for judgment n.o.v. may be supplied by a request for binding instructions, *where such request was treated in the trial court as a motion for directed verdict.* 221 F. 2d at 422. This principle was re-stated by the Court of Appeals in the present case. 536 F. 2d at 11 n. 5. In arguing there is diversity among the Circuits, petitioner has only cited several examples of the application of this same principle, by the Fifth and Seventh Circuits, to factual circumstances different from those in the present case.

Thus in *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co.*, 532 F. 2d 572 (7th Cir. 1976) (on which petitioner relies) the Seventh Circuit empha-

sized the trial court's response to the requested instruction submitted by defense counsel, Mr. Mix:

> "'THE COURT: . . . *This is in effect a directed verdict*, Mr. Mix, Defendant's No. 1.
>
> MR. BOUNDAS: [Plaintiff's Counsel]: And we object to that, Your Honor.
>
> MR. MIX: I think we are entitled to it, Your Honor.
>
> THE COURT: If we are going to the jury at all, I don't think it is proper to give them *a pre-emptory instruction that is in effect a directed verdict.*'" 532 F. 2d at 577 (emphasis added).

The Seventh Circuit based its holding, that sufficient predicate for judgment n.o.v. had been laid, upon its finding from the record that

> "At the time of this conference it is apparent that all of the participants recognized that [defendant's] proposed instruction was, in effect, a motion for directed verdict." 532 F. 2d at 577.

In reaching its conclusion, the Seventh Circuit might as well have been applying the standard stated by the Third Circuit in this case:

> "Where . . . the district court, *with the knowledge of all parties*, treats with and rules upon a binding request for charge as a motion for directed verdict, the necessary predicate for judgment n.o.v. has been provided." 536 F. 2d at 11 n. 5.

The rationale for the Fifth Circuit's conclusion in *Jack Cole Co. v. Hudson*, 409 F. 2d 188 (5th Cir. 1969) is not clearly stated in the brief discussion devoted to the

point in the Court's opinion. 409 F. 2d at 191. However, that rationale may be deduced from that Court's stated reliance on *Roberts v. Pierce*, 398 F. 2d 954 (5th Cir. 1968), which clearly rested on the trial court's treatment of the requested instructions as a renewed motion for directed verdict. 398 F. 2d at 955-56. In view of this, the Court of Appeals in the present case had every reason to conclude, after stating that ". . . we find the factual statements in *Cole* much less clear," that ". . . the district judge in *Cole* apparently treated the defendants' request as a motion for directed verdict, which would satisfy Rule 50(b)." 536 F. 2d at 12 n. 7.

Psinakis, Pittsburgh, and apparently *Cole* all applied the same test. The Third Circuit, recognizing the exception, looked for but did not find any factual basis for its application here. The Third Circuit said:

> "Pepsi [petitioner] requested binding instructions, but it is clear that a request for such instructions, which the District Court neither treated nor ruled upon as it would treat with or rule upon a motion for directed verdict, compare *Psinakis v. Psinakis*, 221 F. 2d 418, 422 (3rd Cir. 1955), will not be considered by this Court as satisfying the necessary predicate for a judgment n.o.v." 536 F. 2d at 11.

The records of *Jack Cole* and *Pittsburgh* are marked by a second important factor which is completely absent from the instant case: statements by the trial court at the close of plaintiff's case clearly indicating the futility of any renewed motion for directed verdict at the close of all of the evidence. In *Jack Cole,* the Fifth Circuit cited from the record the trial judge's statement, that the testimony of plaintiff and of the traffic claim superintendent were sufficient to take the case to the jury. 409 F. 2d at 191 n. 1.

The Seventh Circuit in *Pittsburgh* applied the same test to the record and reached the same conclusion:

> "It appears obvious to us, and it must have appeared equally so to counsel for Brookhaven, that the court had firmly taken the position, notwithstanding any leaning which the judge may have had, that the jury was going to have the first opportunity to decide the case. Renewing the motion or moving for directed verdict on the counterclaim which hinged upon the validity of Brookhaven's defense, would have been nothing more than ritualistic mouthing and nugacious obeisance to the form, but not the spirit, of the Rule." 532 F. 2d at 577.

In no way did the trial judge in the present case suggest that his initial ruling on defendant's motion would render useless a renewal of that motion at the close of all the evidence. Instead, he reminded defense counsel that the motion could be renewed and would receive his serious consideration after all the evidence had been presented.

> "THE COURT: Mr. Mann I will overrule your motion and grant you an exception, of course, and the privilege of renewing the motion in reference to a judgment n.o.v., but I think *at this point* I feel that we should proceed further.
>
> MR. MANN: All right, Your Honor. I will file the formal motions in the morning.
>
> THE COURT: Naturally, and I will deny it formally in the morning, but I thought it would be best for you to know it now so that you could proceed in the morning. Thank you gentlemen. It has been a very interesting argument, and it does raise problems that I shall give *great consideration* to."
>
> **R. 13-118.**

Inasmuch as the Third Circuit in *Psinakis* and in the present case recognized the exception to the requirement of Rule 50(b) found in *Pittsburgh* and *Jack Cole*, it is apparent that there is no conflict among the Circuits. The result reached in this case turned on the absence of any facts in the record which would indicate that the trial court or the parties treated the request for binding instructions as a renewal of the motion for directed verdict, not on the application of a rule of law different from that in other circuits.

CONCLUSION.

For the reasons stated above, a writ of *certiorari* should not issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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